BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

M[redacted] W[redacted],
Petitioner,

v.

GEORGIA VOCATIONAL REHABILITATION AGENCY,
Respondent.

Docket No.: 2421610
2421610-OSAH-GVRA-VR-121-Schroer

FINAL DECISION

I. INTRODUCTION

Petitioner M[redacted] W[redacted] requested a hearing to contest certain actions or inaction by Respondent, the Georgia Vocational Rehabilitation Agency ("GVRA"), in connection with GVRA's provision of vocational rehabilitation ("VR") services under the Rehabilitation Act of 1973 ("Rehabilitation Act" or the "Act"), 29 U.S.C. § 720 et seq. and GVRA's Client Services Policy Manual ("VR Manual"). The hearing took place over two days, on January 10, 2024 and January 16, 2024.[1] Ms. W[redacted] represented herself, and Respondent was represented by Greg Bagley, Esq. For the reasons set forth below, Petitioner's request for relief is **GRANTED in part, and DENIED in part**.

II. FINDINGS OF FACT[2]

A. Ms. W[redacted] applied for VR services in July 2022.

1. Ms. W[redacted] is 47 years old and has a master's degree. In the past, she worked as a loan counselor, human resources officer, and other jobs. In recent years, however, she has experienced

[1] At Ms. W[redacted]'s request, the hearing was conducted by Zoom with closed captioning. She was also advised at the outset of the hearing that any requests for breaks in the proceedings would be granted.

[2] To the extent that certain findings of fact are more appropriately classified as conclusions of law, they should be so construed. To the extent that certain conclusions of law are more appropriately classified as findings of fact, they should be so construed.

a number of medical conditions that affect her ability to work, and she applied for VR services with GVRA in early July 2022. In her application, Ms. W reported that her primary work-related impairments were the result of "multiple chemical sensitivity" or "MCS," which Ms. W described as an environmental illness also known as toxic-induced loss of tolerance or "TILT." She testified that she developed MCS after she was exposed to toxic mold while living in an apartment in Pennsylvania, and that because of her adverse reactions to common chemicals, she can no longer work outside of the home.[3] (Testimony of M. W; Ex. P-14.)

2. GVRA assigned Ms. W's application to Ashley Carter, a rehabilitation counselor at GVRA, who asked Ms. W to sign a release for her medical records. Ms. W returned the signed release along with copies of her most recent medical records to Ms. Carter by email on the same day she applied.[4] In the GVRA case notes for July 11, 2022, Ms. Carter indicated that she would "request and review the applicant's medical records to determine eligibility for GVRA services by September 3, 2022," the deadline set for determining eligibility under the Act.[5] Ms. Carter emailed Ms. W on July 20, 2022, stating that she was "in the process of reviewing

[3] According to the GVRA case notes at the time of her application, Ms. W reported experiencing symptoms including headaches, difficulty moving, fatigue, difficulty breathing, and rashes when she is exposed to many different chemicals. (Ex. P-14.)

[4] Ms. W tried to send all of her medical records to Ms. Carter by email, but because there were over 2,000 pages, Ms. Carter could not attach them to the GVRA file. Ms. Carter wrote in the case notes that she would "print, scan and attach them in pieces." It is unclear from the evidence in the record, however, whether Ms. Carter received or reviewed all the medical records submitted by Ms. W. Jeff Allen from GVRA testified that he believed that GVRA had all of Ms. W's records, which were sent "piecemeal" and were uploaded as they came in with just a slight delay. As discussed *infra*, Ms. W was not allowed to see her entire GVRA file, despite repeated requests, and she was unable to verify what medical records were included in her file, either from those she provided to Ms. Carter or any additional medical records GVRA obtained pursuant to the release. (Exs. P-14, P-16.)

[5] See 29 U.S.C. § 722(a)(6) (60-day deadline for determining eligibility for VR services unless "exceptional and unforeseen circumstances beyond the control of the designated State unit preclude making an eligibility determination within 60 days and the designated State unit and the individual agree to a specific extension of time"). See also VR Manual, Section 214.1.02 (Rev. 2/1/23) ("Within sixty (60) days of acceptance of an application for [VR] services, the counselor shall certify in writing that the applicant has or has not met the basic eligibility criteria, unless: A. Exceptional and unforeseen circumstances exist and the applicant agrees to an extension of the 60 day determination period").

your medical records and will update you once that is done." In an email to Ms. W on August 22, 2022, Ms. Carter confirmed that the eligibility determination was due on September 3, 2022, and that she was trying to get it completed that week. Around that same time, Ms. W, who had continued to seek work while her VR application was pending, was offered a temporary job as a claims specialist with the Social Security Administration ("SSA"). (Testimony of M. W; Exs. P-14, P-16, P-79.)

B. <u>GVRA determined that Ms. W is eligible for VR services in November 2022, two months past the deadline.</u>

3. On September 2, 2022, the day before the eligibility determination deadline, Ms. Carter emailed Ms. W that she had reviewed the medical records in detail, but she needed "more specific information from your doctor about the difficulties and limitations you experience before I can complete the needed paperwork." She asked Ms. W to sign a form to extend the eligibility time frame to "keep your case in compliance while we wait for the needed information to proceed." Ms. W asked what additional information Ms. Carter was seeking and how much more time she would need. She also asked, by email dated September 2, 2022, for a description of the "exceptional and unforeseen circumstances (beyond VR control) that are delaying eligibility determination" and instructions on how to request a copy of her GVRA file. Ms. W also asked whether and on what date Ms. Carter had requested her medical records after she returned the release on July 11, 2022. (Testimony of M. W; Exs. P-14, P-15, P-16.)

4. On September 2, 2022, Ms. Carter emailed Ms. W the following response:

> [T]he medical records that I have do not mention the chemical sensitivities and neurological difficulties that you experience, and we need this information verified from a qualified physician in order to proceed. At the time, I did not see a need to request additional records given that you had provided records from the same physician that we have a release for. I reviewed your records as soon as time

> allowed and they do not contain sufficient information to determine your eligibility. I will request additional information from your doctor as soon as possible and proceed with the process.
>
> As far as the request for a copy of your file, the only thing we would be able to provide at this time is your intake documents.

Ms. W did not believe that this response justified an extension of the eligibility determination, and she refused to agree to the extension. In addition, she reiterated her request to see her file and asked for information about the appeal process. (Testimony of M. W; Ex. P-15.)

5. Notwithstanding Ms. W's refusal to agree to an extension, GVRA did not make an eligibility determination by the 90-day deadline. Rather, Ms. Carter's case notes reflect that she faxed a "Medical Memo" to "the physician" on September 7, 2022.[6] On September 21, 2022, Ms. Carter noted that Ms. W had emailed requesting a case update and that she had sent a copy of a "previous letter that her physician sent to Pennsylvania Vocational Rehabilitation Agency."[7]

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[6] The Court did not find evidence in the record regarding the subject matter of the memo or the identity of the physician to whom it was sent, and Ms. Carter did not testify at the hearing.

[7] The Court finds that it is more likely than not that this case note referred to one of the letters written in 2020 and 2021 by Dr. Emilia A. Cuneo, M.D., a physician with Penn Medicine's Lancaster General Health Physicians in Parkesburg, Pennsylvania, or a nurse practitioner in her practice ("Cuneo Letters"). In one letter from May 2021, Dr. Cuneo stated that Ms. W was a "long time patient" under her care, and that Ms. W suffered from Multiple Chemical Sensitivity Syndrome, which caused her to experience multiple symptoms, including shortness of breath, cough, rash, leg and arm heaviness, weakness, headache, and decreased cognition, when exposed to "most chemicals." Attached to that letter was a list of triggering chemicals, including detergents, smoke, pollution, gasses emitting from office furniture, and dozens more. Dr. Cuneo wrote at least two more letters on Ms. W's behalf, and also completed a healthcare provider questionnaire in 2020 relating to Ms. W's request for accommodations from Amazon, her then employer. Ms. W also provided various treatment notes from Dr. Cuneo. For example, one note was from a December 2020 visit with Dr. Cuneo for an "exacerbation of her asthma" after exposure to bleach. Ms. W reported significant stressors, including her own medical conditions, as well as caring for her son, who has significant disabilities. In addition to MCS, Dr. Cuneo noted other neurologic complaints, persistent asthma, and an adjustment disorder with anxiety. Other treatment notes from Dr. Cuneo referenced chronic back, neck, and wrist pain, and severe asthma with a chronic cough. In October 2020, Dr. Cuneo prepared a treatment note from a "follow-up after telemetry-health visit with Dr. Carrie Redlich at Yale for chemical sensitivity. Doctor endorses that she has treated multiple patients like M and the condition is real. She [Dr. Redlich] is supposed to follow up with me to coordinate care. There is no standard treatment, she will be following up with me as to M's care." Because GVRA did not provide Ms. W access to her entire file, she was unable to confirm whether the Cuneo Letters were received and added to her file on July 11, 2022 with the first tranche of medical records. If that is the case, GVRA should have reviewed them and sought additional records prior to September 2, 2022. Even if they were not received until September 21, 2022, the preponderance of the evidence proved that GVRA knew about the MCS

Ms. Carter responded to Ms. W that she would check on Ms. W 's Open Record Act request and inquire whether the Cuneo Letters could be used to determine eligibility. Ms. W made additional requests to view her GVRA file, and on October 6, 2022, the case notes state that an electronic copy of the "case notes, the intake paperwork, signed documents, and email correspondence" was provided to Ms. W, but "no third-party information will be shared." (Ex. P-14.)

6. On October 20, 2022, Ms. W participated in a telephone appointment with Ms. Carter and her supervisor, John Cheek, who notified Ms. W that MCS "is not formally recognized," but that "anxiety," which was listed on other medical records, could be a recognized diagnosis. Mr. Cheek proposed that GVRA explore anxiety as a basis for eligibility and suggested that Ms. W complete a psychological evaluation paid for by GVRA. Ms. W initially agreed to the evaluation, although she later questioned whether it was necessary and objected to the portion of the proposed evaluation involving intellectual testing. She also agreed to submit documentation regarding other medical conditions, including podiatry and cardiology records. Ms. Carter advised Ms. W that the psychological evaluation was still necessary "to place the applicant in the most appropriate priority category."[8] (Exs. P-14, P-43.)

diagnosis and had a release to seek additional records from Dr. Cuneo well before the end of the 60-day period. (Testimony of M. W, J. Allen; Exs. P-79 through P-86).

[8] It appears that Ms. W did not participate in an evaluation with a GVRA psychologist but obtained a limited psychology evaluation from a private psychologist, Dr. Melissa Dingler, on November 2, 0222. Dr. Dingler diagnosed Ms. W with memory loss, generalized anxiety disorder, insomnia, and possible ADHD. Dr. Dingler's report states that Ms. W was "entitled to accommodations due to her memory issues and anxiety," and that she needed to "work from home so she can avoid distractions and have control over her environment. She now has chemical sensitivities which could be activated if she has to be at an office." GVRA cancelled the authorization to pay for a psychological evaluation in February 2023 because Ms. W "did not participate in the service." It is unclear from the record whether GVRA considered Dr. Dingler's report or the diagnoses when making the eligibility determination. (Exs. P-14, P-26, P-87.)

7. On November 4, 2022, GVRA determined that Ms. W[redacted] was eligible for VR services based on endurance/work tolerance and mobility limitations that affected her ability to sit, stand, or walk for extended periods of time. Her primary disabilities were identified as idiopathic progressive neuropathy and neuralgia, which were considered a combination of orthopedic and neurological impairments. Pursuant to a Notice of Change issued on November 4, 2022, Ms. W[redacted] was assigned to Priority Category 2 as an individual with a significant disability.[9] The GVRA case notes indicated that the primary services GVRA would offer Ms. W[redacted] consisted of an assistive work technology ("AWT") evaluation and related services for three months and medical maintenance for twelve months. (Exs. P-14, P-51, P-109.)

8. The eligibility determination did not mention MCS, memory loss, or anxiety, and the functional limitations were not related to these diagnoses. At the hearing, Mr. Allen testified that a disability for purposes of the Act must pose a substantial impediment to employment and have an impact on an individual's functional activities. GVRA did not accept the MCS diagnosis from Dr. Cuneo as evidence of a disability for two main reasons – (1) the diagnosis was not made by a "specialist," and (2) MCS is not recognized by organizations like the National Institutes of Health ("NIH") or Johns Hopkins. First, with respect to the requirement that the diagnosing physician be

[9] Priority categories determine who receives services when GVRA does not have funds to provide services to all eligible individuals. (Testimony of J. Allen.) See VR Manual, Section 218.1.01. Eligible individuals placed in Priority Category 1 have the "Most Significant Disability," which is defined as limitations in 3 or more functional capacities and requiring multiple VR services over an extended period of time. VR Manual, Section 218.1.07(A). Priority Category 2 is for individuals with a significant disability who have limitations in 1 or more functional capacities and who require multiple VR services over an extended period of time. VR Manual, Section 218.1.07(B). Priority category 3 are all other eligible individuals with a disability. VR Manual, Section 218.1.07(C). In the Notice of Change, Ms. W[redacted] was advised that she had 30 days to appeal this assignment, but there is no evidence that she appealed her priority category assignment at that time. (Ex. P-51.) According to the case notes and the testimony of Jeff Allen, the Director of Policy and Compliance for GVRA, Priority Category 2 was an open category at the time Ms. W[redacted] was found eligible for services. (Testimony of J. Allen; Ex. P-14.) Under the VR Manual, even if Priority Category 2 closes in the future, Ms. W[redacted]'s services will not be disrupted if she is actively participating in VR services. VR Manual, Section 218.1.06. Finally, GVRA can change a person's category to a higher level based on new information but cannot place them in a lower category. See VR Manual, Section 218.1.03.

a "specialist," Mr. Allen explained that the policy in place in 2022 required that documentation of an impairment be from an "acceptable source, i.e. a specialist in the appropriate field." See VR Manual, Section 602.1.01(B). In Ms. W[redacted]'s case, GVRA staff looked up Dr. Cuneo's credentials to see if she was a specialist in treating the symptoms of MCS. Mr. Allen testified that GVRA was looking for a specialist like a dermatologist, pulmonologist, or epidemiologist. As a primary care physician, GVRA determined that Dr. Cuneo was not "skilled in the diagnosis" of MCS. Second, as to the determination that MCS was not a recognized diagnosis, Mr. Allen explained that the VR Manual required that "the diagnosis [be] medically or psychologically recognized as a physical or mental impairment." See VR Manual, Section 602.1.01(A). He testified that "the research" on MCS is "controversial" and "up in the air," although he admitted that Ms. W[redacted]'s medical records were not reviewed by a physician or other medical expert at GVRA and that GVRA did not reach out to Dr. Cuneo. There was also no evidence in the case notes about what other research GVRA undertook relating to MCS, and Mr. Allen did not know whether GVRA had reviewed the website of the Jobs Accommodation Network ("JAN"), a source Ms. W[redacted] cites, for information about MCS. (Testimony of J. Allen.)

9. Mr. Allen further testified that GVRA did not have enough specific information at the time of the eligibility determination regarding how MCS affected Ms. W[redacted] or what chemicals triggered a reaction, information that would be particularly important to complete a needs assessment and develop an Individualized Plan of Employment or "IPE." As an example, Mr. Allen testified that GVRA would not want to send Ms. W[redacted] out into the community and inadvertently cause her harm due to chemical exposure. In order to identify all the barriers to employment resulting from MCS, Mr. Allen testified that GVRA needed to "take a step back" to

reassess what her needs were.[10] In the end, Mr. Allen testified that GVRA had enough to find her eligible based on other disabilities, and that GVRA would take the MCS issues "into consideration" when doing the needs assessment even without recognizing the diagnosis. (Testimony of J. Allen.)

10. Finally, there is no evidence in the record to explain why GVRA did not include Dr. Dingler's diagnoses of anxiety and memory loss as impairments or address related functional limitations. GVRA recommended that Ms. W[redacted] have a psychological evaluation for the purpose of confirming the diagnosis of anxiety as a basis for eligibility in September 2022, and Mr. Allen testified at the hearing that memory loss can be considered a cognitive impairment based on a diagnosis from a neurologist or psychologist and would also be considered for purposes of assigning a priority category and completing a needs assessment. (Testimony of J. Allen; Ex. P-14.)

C. GVRA failed to develop an IPE and prepared to close Ms. W[redacted]'s case in May 2023.

11. After determining eligibility and assigning an open priority category, GVRA is required to conduct a comprehensive needs assessment and develop an IPE. Based on the date of the determination of eligibility, the deadline for developing an IPE for Ms. W[redacted] was February 3, 2023, which GVRA did not meet.[11] Rather, in November 2022, Ms. Carter began collecting

[10] Notwithstanding Mr. Allen's testimony that GVRA had never been provided a "list" of chemical triggers, the Court finds, after weighing the evidence, that GVRA had the Cuneo Letters by at least September 2022, which included such a list, and that they had a release to talk with Dr. Cuneo as early as July 2022. Although there is no record in the case notes that GVRA ever reached out to Dr. Cuneo, and Ms. Carter stated on September 2, 2022 that she had not seen a need to request additional medical records at the time, Mr. Allen testified that if GVRA had a signed release, he believes GVRA would have requested medical records. (Ex. P-18.) Either way, GVRA had sufficient information about Ms. W[redacted]'s MCS triggers, or the means to obtain it, by the time it made the eligibility determination in November 2022, and certainly by the time it completed the IPE in June 2023. Of course, that is not the only impediment to finding MCS a basis for eligibility, as discussed *infra*.

[11] Under the VR Manual, the IPE should be developed, agreed upon, and signed "as soon as possible," but not later than 90 days from the date of the eligibility determination, "unless the counselor and the eligible individual agree to the extension of the deadline and to a specific date by which the IPE must be completed," which must be documented

additional medical records from Ms. W[redacted], including psychology, rheumatology, and neurology records, and conducted a needs assessment interview on November 17, 2022. During the interview, she discussed Ms. W[redacted]'s temporary job with SSA and the challenges Ms. W[redacted] was having, including problems typing because of carpal tunnel issues and an adverse reaction to chemical exposure when she was required to visit the SSA offices. Ms. W[redacted] told Ms. Carter that if she could not get appropriate accommodations from SSA,[12] she would request GVRA assistance in finding other employment. In the case notes around that time, Ms. Carter indicated that she would complete the needs assessment, await word from Ms. W[redacted] regarding her employment with SSA, and follow up with her periodically to check on her progress. Mr. Allen acknowledged that Ms. W[redacted]'s IPE at that time could have been based on a goal of maintaining her employment at SSA, as opposed to finding a new job, and that "post-employment" services are available through GVRA to assist with job retention. (Testimony of J. Allen; Ex. P-14.)

12. At the end of November 2022, Ms. W[redacted] inquired about the "workstation evaluation," which she would need whether she stayed with SSA or looked for a new job, and Ms. Carter replied that she would follow up with AWT staff. Mr. Allen testified at the hearing that Ms. W[redacted]'s "workstation" was her home, so her MCS symptoms complicated an evaluation of her workstation

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and justified in the case file. VR Manual, Section 308.1.01. See also 34 C.F.R. § 361.45(a) & (e) (IPE must be developed and implemented in a timely manner, not later than 90 days after the determination of eligibility, unless the parties agree to extend to a specific date). The Court notes that if the eligibility determination had been timely, the IPE would have been due on December 2, 2022.

[12] At the hearing, Mr. Allen testified that GVRA is the "payer of last resort" for accommodations, citing Section 122.0.00 of the VR Manual regarding comparable services and benefits. According to Mr. Allen, employees must ask their employers first for reasonable accommodations, and GVRA has no legal authority to force employers to provide or even permit particular accommodations. He acknowledged that close captioning communications might be a reasonable accommodation for a disability, but GVRA would require proof that the employer could not or would not provide it before agreeing to undertake responsibility for that accommodation. He admitted, however, that Section 122.1.04 of the VR Manual states that a client is not required to apply for comparable services for AWT, including telecommunications and other technological aids and devices.

by the AWT staff, which included a rehabilitation engineer and an occupational therapist, among others, who typically would conduct the evaluation at the work site. Ms. Carter emailed Ms. W[redacted] on December 1, 2022 that GVRA "may need to get you into a workplan before our AWT team could evaluate the workstation situation" because typically an employer would provide workstation accommodations. At the end of December 2022, Ms. W[redacted] spoke with Ms. Carter and reported continuing problems with working at SSA, including lack of accommodations (specifically, the lack of closed captioning technologies) and an adverse reaction to the gases emanating from a computer monitor that SSA provided for her to use at home. Ms. Carter again advised Ms. W[redacted] that reasonable accommodations are typically the responsibility of the employer, but that if Ms. W[redacted] wished to change jobs, GVRA could assist with placement and other services. If Ms. W[redacted] was not interested in these services, however, Ms. Carter told her that her case would be closed, although she would be eligible for services in the future. (There is no evidence that GVRA offered or discussed post-employment services to assist with job retention during this period.) (Testimony of J. Allen; Exs. P-14, P-28, P-30, P-31, P-60.)

13. Mr. Allen testified at the hearing that GVRA "couldn't" complete the needs assessment or IPE by the deadline because Ms. W[redacted]'s situation was changing and there was so much new information, but the evidence in the record does not support this conclusion. According to the case notes, despite the February 3, 2023 IPE deadline, GVRA staff did no work on Ms. W[redacted]'s case from January through March 2023. In addition, there is no evidence that GVRA received any new information during this time about Ms. W[redacted]'s medical conditions or her job situation, or that GVRA staff did any further work to finalize the needs assessment, arrange for the AWT evaluation, or develop the IPE.[13] Rather, the case notes indicate that in April 2023, two months after the IPE

[13] Mr. Allen admitted that there is no evidence in the case note that GVRA made contact with Ms. W[redacted] between December 30, 2022 and April 6, 2023, despite the provision in the VR Manual that GVRA document contact

due date, GVRA staff reached out to Ms. W[redacted] and asked her whether she was still interested in VR services. According to the case notes, Ms. W[redacted] wanted to remain in her job despite not receiving reasonable accommodations because she needed the health insurance.[14] Under those circumstances, GVRA prepared to close Ms. W[redacted]'s case. The case notes indicated that Ms. W[redacted] "was okay with this," although the notes also stated that Ms. W[redacted] requested information regarding the availability of an "in home" workstation evaluation so that she could provide the results to her employer. Ms. Carter did not know of anyone who conducted AWT evaluations in the home, but she did share information with Ms. W[redacted] about "speech to text" software to help with Ms. W[redacted]'s reported carpal tunnel issues. (Exs. P-14, P-61.)

14. On May 1, 2023, GVRA issued a Notice of Change Letter, closing Ms. W[redacted]'s VR case as of May 31, 2023 "given you have actively chosen not to participate or continue in the VR Program," citing Section 518.1.02(C) of the VR Manual. The letter notified Ms. W[redacted] that she had 30 days to appeal this action under Section 136.0.00 of the VR Manual. (Exs. P-14; P-51, P-109.)

D. In June 2023, after Ms. W[redacted] loses her job, GVRA develops an IPE.

15. Effective May 19, 2023, Ms. W[redacted] lost her job with SSA,[15] and Ms. Carter scheduled another needs assessment interview with Ms. W[redacted] on May 17, 2023. Ms. W[redacted] stated during the interview that due to MCS, she could only work remotely from her home and did not

with eligible individuals every 90 days. See VR Manual, Section 120.1.06. He noted, however, that Ms. W[redacted] was employed and working with SSA to obtain reasonable accommodations during that period. He also noted that GVRA "picked back up" on her case in April 2023.

[14] During this call, Ms. W[redacted] advised Ms. Carter that she had recently been diagnosed with a connective tissue disorder, although the preponderance of evidence did not prove that she provided any documentation of the condition or its impact, if any, on her ability to work at that time. (Testimony of J. Allen; Ex. P-14.)

[15] The termination notice stated that Ms. W[redacted] was "unable to perform the essential functions of the CS position with or without reasonable accommodations." Ex. P-99.

want to work in customer service. Her preliminary VR goal was to find human resources work, and Ms. Carter completed the comprehensive needs assessment in early June 2023. The needs assessment was based on Ms. W[redacted]'s diagnoses of Progressive Neuropathy and Neuralgia and her affected functional capacities of endurance/work tolerance and mobility. As she had six months earlier, Ms. Carter found that Ms. W[redacted] needed an AWT evaluation and services, as well as other VR services. Although the MCS diagnoses was not formally included in the needs assessment, Ms. Carter added an "additional comment" that "client has stated that she has Multiple Chemical Sensitivities that limit her ability to be in public places without negative side effects. The client is requesting assistance finding a work from home position and an evaluation of her workstation and possible needed equipment." (Exs. P-14, P-99.)

16. Based on the Needs Assessment, Ms. Carter developed an IPE, which Ms. W[redacted] signed on June 8, 2023. The IPE identified three objectives for Ms. W[redacted] in human resources, her chosen area of occupation: (1) determine a vocational goal; (2) achieve physical functioning, endurance, and work tolerance; and (3) obtain and maintain employment. THE IPE also identified a number of VR services to help meet these objectives, including counseling and career exploration provided by GVRA beginning in June 2023, ongoing medical maintenance and follow-up provided by Ms. W[redacted]'s physician, and job search assistance and Assistive Work Technology evaluation and services from GVRA beginning in September 2023, with job follow-up services beginning in March 2024. (Exs. P-14, P-50, P-106, P-107.)

E. GVRA provides limited services under the IPE, Ms. W[redacted] is unable to find remote work in her field, and her dissatisfaction with the agency grows.

17. Mr. Allen acknowledged at the hearing that GVRA did not offer any VR services to Ms. W[redacted] prior to the development of the IPE. He also admitted that GVRA has never done an AWT evaluation or offered her any AWT services. Rather, after the IPE was adopted on June 8,

2023, GVRA staff began working with Ms. W[redacted] to explore remote job options, which was a challenge because Georgia is not a "remote work friendly" state. Ms. W[redacted] asked GVRA staff regarding possible remote internships or short-term apprenticeships with state agencies that might be "disability friendly," so she could learn about payroll and other human resources systems. Ms. Carter was unaware of any remote internship opportunities, and Mr. Allen testified that the agency does not maintain a list of internships or remote-friendly employers. Typically, GRVA identifies an individual's work goals and then seeks out employers that are a match. In Ms. W[redacted]'s case, given her request for fully remote employment and her refusal to consider call center work, matching her with potential employers was not a simple process. (Testimony of J. Allen; Exs. P-19, P-35, P-36, P-101.)

18. Through the summer of 2023, Ms. W[redacted] independently researched jobs and internship opportunities, and sent numerous emails to GVRA staff for information and support. GVRA staff provided some job leads with remote working options, but Ms. W[redacted] struggled identifying jobs for which she was qualified and interested and that offered fully remote work. She explored training and licenses in other areas beyond human resources, including claims adjusting, and she paid for some training and licensing fees on her own. (Exs. P-19, P-35, P-36, P-46, P-95 – 98, P-101.)

19. At the beginning of September 2023, Ms. W[redacted] contacted GVRA to express her dissatisfaction with their services, and she made another request for a copy of her GVRA file. Ms. W[redacted] was also dissatisfied with GVRA's response to information she gave them regarding her recent visit to a counselor to discuss symptoms of post-traumatic stress disorder ("PTSD") related to her experience working at SSA, and medical treatment she sought for problems with her shoulder. She testified that her shoulder problems related to a connective tissue disorder and

required physical therapy, which she could not afford, and she also needed counseling for PTSD.[16] Ms. W[redacted] testified that she provided medical records relating to these conditions in July and September 2023, and that GVRA failed to upload these records in a timely manner and did not review them for purposes of updating her IPE until she resent them in October 2023. (Exs. P-19, P-20, P-46, P-91, P-92, P-101, P-102.)

20. On September 11, 2023, GVRA supervisor Sherry Harris spoke with Ms. W[redacted] about a list of topics, including financial support for moving out of state to find work, internships, college or other retraining opportunities, payment for medical services, outside job placement services, and accommodations for PTSD. Ms. Harris offered to amend the IPE to provide a referral to Easter Seals for job placement services, and Ms. W[redacted] agreed. Ms. Harris also agreed to look into whether GVRA could pay for expenses relating to certifications and licensing, as well as for remote counseling services for PTSD. Following this call, Ms. W[redacted] provided documentation that she had already paid $120.00 for a basic claims adjuster license, and GVRA staff concurred that being licensed in multiple states might make her more "marketable." On September 18, 2023, she asked GVRA to confirm that they would pay for her to get licensed in approximately ten other states, the cost for which ranged from about $50 to $150 per state. She also asked GVRA to promptly approve payment for a class to become a certified workers' compensation professional ("CWCP"). Ms. W[redacted] first discussed this class with GRVA staff in July 2023, and the last class of the year began in October. However, GVRA did not approve the CWCP class in time for Ms. W[redacted] to enroll.[17] In addition, although GVRA staff made some efforts to identify available remote

[16] Mr. Allen testified that GVRA could consider providing counseling services for PTSD and physical therapy as VR services but would need to determine whether there were comparable benefits available first, and if not, identify approved providers for the services before adding them to the IPE. In addition, Mr. Allen testified that he believed GVRA had looked for approved providers who offered these services remotely but they were not successful.

[17] Ms. Harris emailed Ms. W[redacted] on October 10, 2023, stating that there was "some confusion" about the timing, and that there were "steps" that must be followed to make an entity a vendor before a program can be approved

counseling services and other community resources that provide financial assistance to unemployed individuals for housing and utility costs, healthcare, and food expenses, they were largely unhelpful. (Exs. P-19, P-20, P-48, P-101, P-103, P-104.)

21. On September 19, 2023, Ms. W's IPE was amended to add a comprehensive vocational evaluation through Easter Seals, paid for by GVRA, beginning in October 2023, and job placement through Easter Seals, beginning in November 2023. During September, Ms. W continued to research jobs, and asked GVRA whether they had relationships with certain employers who were hiring in her field.[18] In October 2023, Ms. W grew increasingly frustrated with GVRA, and she submitted public comments to be shared with GVRA's Board and made multiple requests to access her case file, including emails, case notes, a list of employers that GVRA staff had contacted on her behalf, records relating to her requests for payment for classes and licenses, documentation of the cost of the referral to Easter Seals, any audit of her file, and other specific records. Ms. W contends that GVRA did not provide all the requested records,[19] did not pay for the requested licenses or classes, including the CWCP class, and has never arranged for an AWT evaluation or helped with closed captioning technologies. (Testimony of M. W; Exs. P-7, P-42, P-50, P-101, P-108, P-110.)

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for payment. At the hearing in January 2024, Mr. Allen testified that GVRA was still working on approving the vendor for the CWCP class, but there had been some "hold ups." (Ex. P-20.)

[18] For example, Ms. W found a job posting for claims positions with a Georgia company called CorVel. She emailed GVRA on September 28, 2023, and GVRA staff responded later that day that GVRA did not have a relationship with CorVel, but they could put it on the list for the "business relations specialist." Ms. W stated that over a month later, she had not heard from a business relations specialist or received any assistance with this job lead. She has also requested that GVRA reach out to other potential employers, including Walmart, the City of Augusta, and others, but she has seen no evidence in her file that GVRA contacted any of these potential employers on her behalf. (Testimony of M. W; Exs. P-7, P-37.)

[19] Mr. Allen testified that the agency is not opposed to Ms. W reviewing her entire file electronically in a controlled setting, with the exception of documents obtained from third parties. However, the evidence proved that as of the date of the hearing, GVRA had not offered her an opportunity to review the file electronically or notified her what, if any, documents would be excluded as third-party documents.

22. On November 1, 2023, Ms. W attended a virtual meeting with GVRA staff and Jennifer Page, a representative from the Client Assistant Program or "CAP."[20] The GVRA case notes from the meeting state that Ms. W was very frustrated with GVRA's failure to comply with the VR rules. According to case notes, which Ms. W contends are inaccurate,[21] a GVRA representative told Ms. W that they "cannot go back and fix anything but going forward we can assist her to find a job." Among many other complaints about GVRA, Ms. W requested information about how to appeal GVRA's actions, repeated her request for financial assistance to pay her mortgage, and asked how GVRA would "fix" their past failures to provide services, which she stated contributed to her inability to maintain or obtain employment. She expressed a willingness to explore part-time work, including data entry work, but she reiterated that she is not willing to do call center work, even on a part-time basis. (Ex. P-41.)

F. Ms. W requests an administrative hearing.

23. Ms. W requested an administrative hearing on or about November 14, 2023, after attempting to pursue GVRA's internal Administrative Review process without satisfaction.[22]

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[20] Previously, on October 5, 2023, Ms. W signed a Notice of Representation and Authorization for Release of Information for CAP, a division of the Law Offices of Martin & Jones, to represent her. She later argued that she had not given specific permission for Ms. Page to be invited to the November 1, 2023 meeting, and she was not satisfied with Ms. Page's participation. (Ex. R-1.) The day after the meeting, November 2, 2023, she emailed GVRA and rescinded her permission to have CAP as part of her team and instructed GRVA not to include them in emails or meetings. (Exs. P-37, P-40.)

[21] Ms. W argued that the case note from the meeting (Exhibit P-41) was inaccurate, and that she requested that GVRA amend the case note under Section 110.1.09 of the VR Manual. (Exhibit P-37.) Under the VR Manual, if GVRA decides to deny a request to remove or amend something in a case file, it must issue a Notice of Change form and allow the individual to add a rebuttal to the file. The evidence in the record proved that GVRA did not issue a Notice of Change, but there is no evidence that the case note was amended or removed as Ms. W requested. Mr. Allen testified that GVRA may not have understood Ms. W 's request to amend the note, and that they were not opposed to looking into this request.

[22] According to Ms. W , when she asked, on November 9, 2023, to meet with the director of client services, the next step in the informal Administrative Review, she was told it would take 60 days to schedule a meeting because of the holidays. Mr. Allen testified that GVRA was not ignoring Ms. W , and that she spoke with many GVRA supervisors, including the Executive Director, between November 2023 and January 2024.

Instead of transmitting her request to the Office of State Administrative Hearings ("OSAH"), GVRA staff provided Ms. W[redacted] a blank copy of the OSAH referral form, and she filled it out and sent it to OSAH herself on December 14, 2023. The case was assigned to the Undersigned Administrative Law Judge, who conducted a pre-hearing telephone conference with Ms. W[redacted] and counsel for GVRA, Greg Bagley, on December 20, 2023. Ms. W[redacted] agreed to file a more definite statement of her claims at the request of GVRA, and she did so on December 26, 2023, identifying over 20 claims. The hearing was held by Zoom on January 10, 2024[23] and January 16, 2024. Prior to the hearing, GVRA consented to the admission of Petitioner's 112 exhibits, and they are included in the record, with the exception of Exhibit P-33, which was not served on GVRA or filed with OSAH. Ms. W[redacted] submitted a closing brief on January 22, 2024, and the record closed.

24. Ms. W[redacted] seeks a determination that GVRA has discriminated against her by failing to recognize MCS as a disability, as well as a finding that GVRA has committed substantive and procedural violations of the Act and the VR Manual. She blames GVRA's actions and inaction for her termination from SSA and for her lack of employment since that time. As remedies for these alleged violations, Ms. W[redacted] seeks lost wages; reimbursement for job seeking expenses; and prospective relief, such as counseling for PTSD, physical therapy for her shoulder, payment for an upcoming March 2024 CWCP class; various licensing fees; and job placement services, including outreach to employers in her field of interest. She also seeks an order requiring GVRA to follow the procedural rules relating to timeliness, informed choice, and access to her file.

25. During the hearing, GVRA argued generally, without providing legal authority or filing a post-hearing brief on the issue, that Ms. W[redacted] is not entitled to any compensatory relief for any

[23] With the consent of the parties, the January 10, 2024 hearing in Ms. W[redacted]'s case occurred immediately following the conclusion of a separate hearing related to Ms. W[redacted]'s son's GVRA application and services.

procedural or other violations, but that the agency is willing and committed to working with Ms. W[redacted] going forward to provide the services and procedural rights she is entitled to under the Act.

III. CONCLUSIONS OF LAW

A. General Authority

1. An applicant for, or recipient of, a public assistance benefit shall bear the burden of proof unless the case involves an agency action reducing, suspending, or terminating a benefit. Ga. Comp. R. & Regs. 616-1-2-.07(1)(d). The standard of proof on all claims is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21.

2. The Rehabilitation Act was intended to "empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." 29 U.S.C. § 701(b)(1). To meet this goal, the Act authorized federal funding and assistance to States to operate "statewide comprehensive, coordinated, effective, efficient, and accountable programs of vocational rehabilitation." 29 U.S.C. § 720(a)(2). In order to be eligible to receive federal funding, States are required to obtain federal approval of a State plan for VR services and to designate a single agency to administer the plan. 29 U.S.C. § 721(a)(1)(A) & (2). The State plan must include, among other things, for the timely development of IPEs for eligible individuals and must provide assurances that the state will provide the services in accordance with the IPE. See 29 U.S.C. § 721(a)(9)(A) & (B). The State plan must also include "an assurance that, prior to providing an accommodation or auxiliary aid or service or any vocational rehabilitation service to an eligible individual…, the designated State unit will determine whether comparable services and benefits are available under any other program." 29 U.S.C. § 721(a)(8)(A)(i).

3. Under the Act, States must establish procedures to allow an applicant or an eligible individual the opportunity to request an impartial due process hearing regarding determinations made by GVRA that affect the provision of VR services. See 29 U.S.C. § 722(c)(1); 34 C.F.R. § 361.57(a); O.C.G.A. § 49-9-13 ("Any individual applying for or receiving [VR] services who is aggrieved by any action or inaction of the agency shall be entitled . . . to a hearing."). The hearing officer has the authority to render a decision and require actions regarding the applicant's or eligible individual's VR services under the Act. 29 U.S.C. § 722(c)(5).

4. Under the procedures set forth in the VR Manual, a request for a due process hearing must be made in writing within ten calendar days from the receipt of an administrative review decision and should be directed to GVRA Leadership. See VR Manual, Sections 142.1.02, .03. The GVRA General Counsel's Office must then notify OSAH within thirty calendar days, and OSAH must schedule and conduct the hearing within forty-five days from the date of the request, unless both parties agree to a specific extension of time. VR Manual, Sections 142.1.04, .05. The hearing before OSAH shall be conducted pursuant to the Georgia Administrative Procedures Act ("APA"), and the decision is based on the evidence in the record, the Act, with its implementing regulations, the approved state plan, and the VR Manual.[24] VR Manual, Sections 142.1.07, .08; see also 34 C.F.R. § 361.57(e)(3); O.C.G.A. § 49-9-13.

B. Determining Eligibility for VR Services

1. Federal Law

5. "Under Title I of the Act, an individual is eligible to receive VR services if he or she qualifies as an 'individual with a disability' and 'requires vocational rehabilitation services to prepare for, secure, retain, or regain employment.'" See Millay v. Maine, 986 F. Supp. 2d 57, 69-

[24] A copy of the VR Manual in effect at the time the request for hearing was filed is included in the record as Exhibit ALJ #1.

70 (D. Me. 2013) (quoting 29 U.S.C. § 722(a)(1)). The Act defines an "individual with a disability" as any individual who "(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment and (ii) can benefit in terms of an employment outcome from vocation rehabilitation services." 29 U.S.C. § 705(20). With certain exceptions, the Act also includes within the definition of an "individual with a disability" any person who has a disability as defined under the Americans with Disabilities Act ("ADA"). Id. See 42 U.S.C. § 12102.[25]

6. In an ADA case, the Court of Appeals for the First Circuit noted that "[t]here is no per se rule about either the type or quantum of evidence that a plaintiff seeking to establish a disability must supply." Mancini v. City of Providence, 909 F.3d 32, 39 (1st Cir. 2018). Although medical evidence is not always required to prove a disability, it "is more likely to be necessary to show an impairment when a condition would be unfamiliar to a lay jury and only an expert could diagnose that condition." Mancini, 909 F.3d at 41.[26] Of course, the definition of an "individual with a

[25] Congress drew the ADA's definition of disability almost verbatim from the Rehabilitation Act, and cases decided under the ADA are precedent for the Rehabilitation Act. See Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 193 (2002), *superseded on other grounds by* ADA Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-32, Sec. 2(a)(7), Sept. 25, 2008, 122 Stat. 353; Long v. Potter, No. 1:04-CV-2888, 2006 U.S. Dist. LEXIS 102893 (N.D. Ga. Dec. 1, 2006), *report and recommendation adopted* 2007 U.S. Dist. LEXIS 104811 (N.D. Ga. Jan. 26, 2007) (courts look to regulations and case law interpreting both the ADA and the Act when reviewing disability claims); Cash v. Smith, 231 F.3d 1301, 1305, n.2 (11th Cir. 2000) ("Cases decided under the Rehabilitation Act are precedent for cases under the ADA, and vice-versa.") (citing Pritchard v. Southern Co. Servs., 92 F.3d 1130, 1132 n.2 (11th Cir. 1996)); 29 U.S.C. 794(d) (standards used to determine employment discrimination under the Act shall be the same standards applied under Title I of the ADA).

[26] In Mancini, the plaintiff injured his knee at work, and later filed a claim against his employer under the ADA for disability discrimination. The district court granted summary judgment against the plaintiff on the ADA claim because his affidavit stated that his diagnosed impairment was "chondromalacia," but there was no medical evidence to explain the diagnosis. The First Circuit agreed that if the term "chondromalacia" was the "only insight into the nature of his alleged impairment," then medical evidence would be required. But, in this case, the record made manifest that the alleged impairment was a knee injury from plaintiff's on-the-job accident, which "plainly fall within the universe of impairments that a lay jury can fathom without expert guidance." The obvious example of an impairment that does not require supporting medical testimony is a missing limb, but other common medical infirmities, such as neck and back pain or heart attacks, do not require medical evidence to prove an impairment. Id. at 41.

disability" does not rest solely on the existence of an impairment; it also requires proof that the impairment substantially impedes employment (or, in the case of the ADA, "substantially limits one or more major life activities"). See 29 U.S.C. § 705(20); 42 U.S.C. § 12102.[27] Consequently, medical evidence may be needed when the nexus between impairment and purported limitations is not clear. Id. at 42. In Mancini, the First Circuit held that although expert testimony was not required to prove that a knee injury is connected with problems standing and walking, the plaintiff's "wholly conclusory statements" that his impairment substantially limited his major life activities, without providing even "a hint as to how or in what ways the alleged limitation manifested itself," were insufficient to withstand summary judgment. Id. at 44.[28] In addition, in some cases, such as those involving mental health impairments, "courts have regularly held that a self-diagnosis is not sufficient to establish the existence of an impairment." Jones v. McDonough, No. 3:19-cv-00310, 2021 U.S. Dist. LEXIS 48000 (M.D. Tenn. Mar. 15, 2021).

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[27] The Court notes that with the passage of the ADAAA in 2008, Congress clarified that the "substantially limits" criteria in the ADA was not intended to be a demanding standard and should be construed broadly in favor of expansive coverage to the maximum extent permitted. 29 C.F.R. § 1630.2(j)(1)(i). See Jones v. McDonough, 2021 U.S. Dist. LEXIS 48000 (M.D. Tenn. Mar. 15, 2021) (ADAAA changes to "substantially limits" construction apply to the Rehabilitation Act).

[28] See also Russell v. Phillips, 66 Co., 687 Fed. Appx. 748 (10th Cir. 2017) (citing Felkins v. City of Lakewood, 774 F.3d 647 (10th Cr. 2014)) (to prove disability under ADA, plaintiff's statements admissible to describe symptoms, like pain and difficulties walking, but inadmissible to diagnose condition or state how that condition causes limitations on major life activities, which requires the special skill and knowledge of an expert witness; holding that plaintiff's affidavit does not prove that medications taken for depression caused insomnia); Smeraldo v. Jamestown Pub. Sch., No. 21-CV-578, 2022 U.S. Dist. LEXIS 60539 (W.D.N.Y. Mar. 31, 2022) (claim of disability under ADA must be more than just a diagnosis of a condition, must prove how those impairments substantially limit major life activities); Tesone v. Empire Mktg. Strategies, 942 F.3d 979, 997 (10th Cir. 2019) (lay witness competent to testify concerning physical injuries and conditions which are susceptible to observation by an ordinary person, but "where injuries complained of are of such character as to require skilled and professional persons to determine the cause and extent thereof, they must be proved by the testimony of medical experts"); but see 29 CFR 1630.2(j)(1)(v) (substantially limits inquiry "usually will not require scientific, medical, or statistical analysis"); Katz v. City Metal Co., 87 F.3d 26, 32 (1st Cir. 1996)(no general rule that medical testimony always required to prove disability); EEOC v. AutoZone, Inc., 630 F.3d 635, 643 (7th Cir. 2010) ("No language in the ADA or implementing regulations states that medical testimony is required."); EEOC v. Phoebe Putney Mem. Hosp., Inc., 488 F.Supp.3d 1336, 1349 (M.D. Ga. 2020) (to determine if episodic anxiety is a disability under ADA, court must consider whether, while active, plaintiff's anxiety substantially limits a major life activity as compared to most people in the population; evidence of limitations usually does not require medical testimony, although in this case physician did testify about diagnosis, how anxiety is treated, and plaintiff's symptoms).

7. Finally, federal law requires that the determination of the existence of disabilities must be done on a case-by-case basis. See Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of the impairment on the life of the individual"); Butler v. Econ-O-Check Corp., No. 1:22-CV-1465, 2024 U.S. Dist. LEXIS 13529, *25-26 (N.D. Ga. Jan. 25, 2024) (courts must conduct an individualized inquiry into a plaintiff's claimed disability in order to fulfill the statutory obligation to determine the existence of disabilities on a case-by-case basis)).[29] See also 29 C.F.R. 1630.2(j)(1)(iv) ("The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.").

2. VR Manual Provisions

8. Unlike federal law, the VR Manual mandates medical documentation of an impairment to determine eligibility for VR services, at least in most cases.[30] Specifically, under Section 208.1.02, GVRA "generally accepts as an impairment any medically determinable condition which meets all requirements of the first basic criterion of eligibility (Refer to 214.1.03)[31] if:"

> A. The diagnosis is medically or psychologically recognized as a physical or mental impairment;

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[29] In this recent federal report and recommendation from the Northern District of Georgia, Magistrate Judge Bly considered whether Crohn's Disease is a disability under the ADA. Although the defendant cited several cases that concluded that Crohn's disease is not a disability, Judge Bly, based on his review of the evidence in the record, as well as his consultation of the Merck Manual (which he noted was considered by the Eleventh Circuit as a "source whose accuracy cannot reasonably be questioned" and the basis for taking judicial notice that Grave's Disease is a medical condition capable of substantially limiting major life activities), found that there was sufficient evidence to create a genuine issue of material fact as to whether the plaintiff had a disability recognized by the ADA. Id. (citing Harris v. H & W Contr. Co., 102 F.3d 516, 522 (11th Cir. 1996)).

[30] Only the following impairments can be documented solely by counselor observation under the VR Manual: amputations, burns, facial deformity, obesity, and visual disorders. VR Manual, Section 208.2.01(F).

[31] The basic eligibility criteria are that the applicant has a physical or mental impairment that results in a substantial impediment to employment, and the applicant requires VR services to prepare for, secure, retain, advance in, or regain competitive integrated employment. VR Manual, Section 214.1.03.

B. Documentation of the impairment is from an acceptable source, i.e. a specialist in the appropriate field (Refer to 602.1.03);[32]

C. Documentation of the impairment, regardless of age, reflects the current level of functioning of the individual;

D. The diagnosed condition is not specifically excluded by VR as being considered a recognizable impairment. Refer to 602.1.01(D).[33]

9. Under the VR Manual, it is the obligation of the rehabilitation counselor to determine if there is an existing source of information to document a "medically determinable impairment," and if not, to obtain the evaluations necessary for GVRA to "make a decision concerning the nature, severity, and impact of the impairment." VR Manual, Sections 208.1.03, 208.1.04. Social Security award letters, school psychologist records, and medical, hospital, or psychologist's records are all acceptable sources of information under the VR Manual. In the event that the available documentation is "unclear, contradictory, or insufficient," the VR Manual provides that a counselor may obtain a consultation from the medical professional who completed the original report, the current treating physician, or "another appropriate source for clarification and updating." VR Manual, Section 210.1.01.

[32] Section 602.1.03 lists the types of specialists that must document certain impairments. For example, the following specialists can document cancer as an impairment: oncologists, radiologists, pathologists, physicians skilled in the specialty of the particular body system suspected of containing the malignancy, or internists certified and skilled in oncology. For some impairments, "specialists in family practice" are acceptable sources of documentation, including for AIDS, arthritis, asthma, burns, COPD, diabetes, endocrine disorder, end-stage renal disease, heart disorder, and hypertension. MCS is not specifically listed in Section 602.1.03.

[33] Section 602.1.01(D) contains a non-exhaustive list of conditions that GVRA does not recognize as impairments, including nicotine dependence, controlled hypertension, and substance-related disorders resulting from the current use of alcohol or illegal drugs. MCS is not listed in Section 602.1.01(D) as an excluded condition.

3. GVRA's Determination of Disabilities

Multiple Chemical Sensitivity

10. When Ms. W[redacted] applied for VR services, she listed MCS as the primary physical impairment that was impeding her ability to find and maintain employment. Putting aside for the moment GVRA's undisputed procedural failures in handling Ms. W[redacted]'s application and IPE, Ms. W[redacted]'s primary dispute with GVRA is over whether she should have been found eligible for VR services based on MCS, not just her other impairments. The evidence she presented in support of her position consisted mainly of (i) the Cuneo Letters and related treatment notes from over two years ago, (ii) her own reports that she continues to experience adverse reactions to many common, often unidentifiable chemicals, such as gasses emitting from a new computer monitor, and (iii) a 1992 memorandum from the Deputy General Counsel of the Department of Housing and Urban Development ("HUD"), which found that MCS could constitute a "handicap" for purposes of the Fair Housing Act ("FHA"). GVRA did not consult with Dr. Cuneo or any other medical professional regarding the MCS diagnosis, and it did not present any evidence on its "research" into MCS, other than naming the two institutions – NIH and Johns Hopkins – that at some time and in some fashion made statements that led GVRA to believe that MCS is too controversial to be considered a "recognized" impairment.

11. Faced with a limited amount of reliable, current, probative evidence, the Court has reviewed case law on MCS, which although mixed, leans heavily against recognizing MCS as a disability.[34] For example, in 2020 the Sixth Circuit Court of Appeals found that "[a]s far as we

[34] MCS has had a chilly reception in federal courts for decades. See Ruby Afram, New Diagnoses and the ADA: A Case Study of Fibromyalgia and Multiple Chemical Sensitivity, 4 YALE J. HEALTH POL'Y L. & ETHICS 85 (2004). Although, "no formal barrier keeps the law from expanding to cover new disabling conditions as they are discovered," and courts have come to accept some new diagnoses, such as fibromyalgia, federal courts have been slow to recognize MCS. Id. (Both fibromyalgia and MCS "lack a known etiology; both occur much more frequently in women than in men; and, unlike most 'established' conditions, neither has a generally accepted, 'objective' medical test that allow for its diagnosis. . . . [B]ut while courts have generally accepted a diagnosis of fibromyalgia, MCS has

are aware, 'no district court has ever found a diagnosis of multiple chemical sensitivity . . . to be sufficiently reliable to pass muster under *Daubert.*'" Madej v. Maiden, 951 F.3d 364, 367 (6th Cir. 2020)(affirming district court's exclusion of expert testimony on MCS in an FHA and ADA suit) (citations omitted). The Madej court cited a Tenth Circuit decision as well as a "mountain of precedent" (admittedly ten years old) that found that MCS "is a controversial diagnosis that has been excluded under *Daubert* as unsupported by sound scientific reasoning or methodology." Id. at 374-75 (collecting cases) (quoting Summers v. Mo. Pac. R.R. Sys., 132 F.3d 599, 603 (10th Cir. 1997)). In fact, in Madej, the plaintiffs' "own doctors admitted that MCS remains unrecognized by the American Medical Association and unlisted in the World Health Organization's International Classification of Diseases." Id. at 375. See also Anderson v. Sch. Bd. of Gloucester Cnty., No. 3:18cv745, 2022 U.S. Dist. LEXIS 122764 (E.D. Va. Jan. 10, 2022).[35]

12. Moreover, the Court has not found any reported cases in Georgia, either state or federal, that have recognized MCS as a disability under the Act or ADA. See, e.g., Patrick v. Southern Co.

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had been subjected to significant exclusion - most importantly through the use of the *Daubert* standard for expert testimony and evidence, established by the Supreme Court in *Daubert v. Merrell*.").

[35] In excluding expert testimony on MCS under *Daubert*, the federal district court acknowledged a number of reported state and administrative cases that appear to have recognized MCS for some purposes, but found that these cases were not applying *Daubert*, and that the experts in the Anderson case failed to present any evidence to demonstrate advancement in the scientific community that would indicate broad acceptance of the MCS diagnosis. Id. Moreover, a non-exhaustive search of recent reported administrative decisions shows that most decisions that recognize MCS do so based on a record that includes testimony or detailed reports from medical experts. See, e.g., Names Redacted by Agency, 2023 BVA LEXIS 28827 (Vet. App. 2023) (BVA accepts as probative the opinion of forensic and clinical neuropsychologist that veteran experienced serious, acute, and chronic exposure to fuels for 30 months of service, and that his symptoms were consistent with "chronic solvent encephalopathy," based on neuropsychologist's detailed review of the veteran's work history, a description of the effects of the solvents and toxins, and his statement that the disorder was recognized in the scientific literature); Names Redacted by Agency, 2023 BVA LEXIS 63585 (Vet. App. 2023) (BVA's finding that veteran met criteria for MCS due to a respiratory disability from a Gulf War exposure was based on veteran's participation in an intensive multi-day investigation of Gulf War illnesses, including complete history, physical examination, laboratory testing, and assessments done of respiratory status); see also William M. v. Saul, 2019 U.S. Dist. LEXIS 170569 (C.D. Cal. May 31, 2019) (in deciding whether applicant for disability insurance benefits had a mental impairment, SSA ALJ properly discounted opinion of treating physician, who diagnosed plaintiff with MCS and toxic encephalopathy; physician had relied on SPECT (single photon emission computerized tomography) scans and blood work, but ALJ found that brain imaging for psychiatric diagnosis is unproven, the blood work was not explained, and physician failed to reference sufficient medically acceptable objective clinical or diagnostic findings, among other reasons.).

Servs., 910 F. Supp. 566 (N.D. Ala. 1996), *aff'd* 103 F.3d 149 (11th Cir. 1996); Dickerson v. Sec'y, Dep't of Veterans Affairs Agency, 489 Fed. App'x. 358 (11th Cir. 2012); Whillock v. Delta Air Lines, 926 F. Supp. 1555, 1561 (N.D. Ga. 1995); Thomas v. Comcast Cable Commc'ns Mgmt., No. 1:19-cv-01953, 2020 U.S. Dist. LEXIS 271750 (N.D. Ga. Nov. 24, 2020). At most, these cases allow for the possibility that a litigant could present sufficient evidence that a trier of fact could find an impairment based on MCS. Finally, the Court has consulted the Merck Manual, a resource relied upon by federal courts in this Circuit in disability cases, and the Merck Manual notes that there is no universally accepted definition of MCS, which it refers to as "idiopathic environmental intolerance." See Donald W. Beck, M.D., Idiopathic Environmental Intolerance (Multiple Chemical Sensitivity; Environmental Illness), Merck Manual, https://www.merckmanuals.com/professional/special-subjects/idiopathic-environmental-intolerance/idiopathic-environmental-intolerance (Sept. 2022). According to the Merck Manual, idiopathic environmental intolerance generally refers to the development of multiple symptoms attributed to exposure to any number of identifiable or unidentifiable chemical substances that are inhaled, touched, or ingested. Id. The Merck Manual notes that "many physicians consider the etiology to be psychologic, probably a form of somatic symptom disorder. Others suggest that the syndrome is a type of panic attack or agoraphobia." Id.

13. With this case law as background, and mindful of the Supreme Court's admonition that an individualized determination of disability does not hinge on the name or diagnosis of the impairment, the Court has weighed the evidence presented by Ms. W[redacted] and concludes that she has not met her burden to prove that she has a physical or mental impairment that results in a substantial impediment to employment due to MCS. First, pretermitting whether the Act permits GVRA to routinely require documentation from a specialist to prove the existence of an

impairment for purposes of proving eligibility for VR services, the Court concludes that in this case, such a requirement was proper. MCS is not a common condition, easily understood by lay persons, GVRA, or this Court such that Ms. W's own testimony or the somewhat summary statements in the Cuneo Letters from 2020 and 2021 constitute sufficient probative evidence of an impairment. From the evidence in the record, Dr. Cuneo appears to be a family medicine practitioner, who served as Ms. W's primary care physician for several years. Although the Cuneo Letters clearly diagnosed Ms. W with MCS and identified many environmental triggers, it is unclear from the letters whether Dr. Cuneo is skilled in the diagnosis and etiology of MCS,[36] whether she conducted any clinical or diagnostic testing to confirm Ms. W's self-report of symptoms and triggers, or whether she considers MCS a physical impairment, a mental impairment, or some combination of both. It is also unclear from the Cuneo Letters and Ms. W's own statements whether she experiences physical symptoms whenever she leaves her home or whether her reticence to work outside the home is due, in part, to anxiety over a possible exposure to an unknown offensive chemical.

14. Given the federal courts' continued doubts on the reliability of the science behind MCS, the Court concludes that it was reasonable for GVRA to require documentation from a specialist to prove (i) that MCS is a recognized impairment and (ii) that MCS substantially impeded Ms. W's opportunities for employment. This does not mean that Ms. W could not provide such documentation in the future, or that GVRA under Section 210.1.01 of the VR Manual could not have sought a consultation with Dr. Cuneo or another "appropriate source for clarification" in light of its questions about MCS. As courts have recognized, the "'[l]aw lags science, it does not lead it.'" Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996). Ms. W may be able

[36] In fact, it appears from her treatment notes that Dr. Cuneo intended to consult with an expert from Yale with experience treating patients with MCS regarding Ms. W's care.

to present sufficient evidence in the future to prove to GVRA that MCS is medically or psychologically recognized as an impairment and that it substantially impedes her employment. She simply has not done so based on the preponderance of the evidence in the record of this case. Accordingly, the Court concludes that Ms. W[redacted] failed to meet her burden to prove that GVRA's determination that she was not eligible for VR services based on a diagnosis of MCS was improper.

Anxiety and Memory Loss

15. The evidence in the record proved that Ms. W[redacted] was diagnosed with anxiety and memory loss by a licensed psychologist in November 2022 and that GVRA had information about a prior anxiety diagnosis at the time it made its eligibility determination. "Generalized anxiety disorder is considered to be an impairment under the ADA because 'mental impairment means any mental or psychological disorder.'" Phoebe Putney Mem. Hosp., Inc., 488 F.Supp.3d at 1349 (Under ADA, determination of whether an individual's anxiety is a disability turns on whether it substantially limits one or more major life activities compared to most people in the general population, a question that does not usually require medical evidence); see also Forsyth v. Univ. of Ala. Bd. of Trs, No. 7:17-cv-00854, 2018 U.S. Dist. LEXIS 100351, *10, n.2 (N.D. Ala. 2018) (anxiety and depression occur in varying degrees of severity and not all cases of depression or anxiety are severe enough to constitute a disability). Having considered the evidence in the record, including Dr. Cuneo's notes, Dr. Dingler's report, Mr. Allen's testimony, Ms. W[redacted]'s testimony and actions during the hearing, and the GVRA case notes, the Court concludes that Ms. W[redacted] proved by a preponderance of the evidence that her diagnosed anxiety disorder presents a significant impediment to her employment, and that GVRA erred in not including it as a basis of eligibility.

C. GVRA committed numerous procedural violations.

16. Ms. W[redacted] asserted, and GVRA did not deny, that the agency violated many procedural requirements set forth in the Act and the VR Manual, including their obligation to act with "reasonable promptness." See VR Manual, Section 136.1.01. Based on the Findings of Fact, the Court concludes that GVRA committed the following procedural violations:

a) GVRA did not thoroughly review all of Ms. W[redacted]'s medical records or obtain necessary evaluations or other assessments with reasonable promptness during the eligibility determination period as required under Section 208.1.03 – 208.1.06 of the VR Manual;

b) GVRA failed to meet the 60-day deadline for determining eligibility, failed to obtain Ms. W[redacted]'s consent for an extension, and failed to prove that the two-month delay was the result of "exceptional and unforeseen circumstances" beyond its control as required under 29 U.S.C. § 722(a)(6) and Section 214.1.02 of the VR Manual;

c) GVRA failed to consider Ms. W[redacted]'s diagnosis of anxiety as a separate impairment when assigning Ms. W[redacted] to a priority category as required under Section 218.0.00 of the VR Manual;

d) GVRA failed to either amend the case notes relating to the November 1, 2023 meeting (Exhibit P-41) or deny Ms. W[redacted]'s request to amend by issuing a Notice of Change and allowing her to add a rebuttal to her file as required by Section 110.1.09 of the VR Manual;

e) GVRA failed to document contact with Ms. W[redacted] at least every 90 days during the period it was supposed to be developing her IPE (January through March 2023) as required under Section 120.1.06 of the VR Manual;

f) GVRA failed to conduct the comprehensive needs assessment "as soon as a determination [of eligibility] has been made" as required under Section 302.1.01 of the VR Manual;

g) GVRA failed to develop the IPE by the 90-day deadline as required by 34 C.F.R. § 361.45(a) & (e) and Section 308.1.01of the VR Manual;

h) GVRA failed to provide Ms. W timely access to her entire file, including all the medical records they used to make her eligibility determination, as required by 34 C.F.R. § 361.38[37] and Section 136.1.14 of the VR Manual; and

i) GVRA failed to provide an internal Administrative Review with reasonable promptness or to forward Ms. W 's request for a hearing to OSAH as required by Section 138.1.00 of the VR Manual.

17. However, based on the preponderance of the evidence, the Court concludes that Ms. W failed to prove that GVRA committed a procedural violation based on its invitation of a CAP representative to the November 1, 2023 meeting in light of Ms. W 's signed Notice of Representation and Authorization for Release of Information for CAP. Rather, the Court concludes that GVRA's action with respect to CAP were consistent with Sections 106.0.00 and 108.0.00 of the VR Manual.

D. GVRA also violated substantive provisions of the Act and the VR Manual.

18. Based on the Findings of Fact above, the Court concludes that Ms. W met her burden to prove by a preponderance of the evidence that GVRA violated substantive provisions of the Act and the VR Manual, as follows:

[37] "[I]f requested in writing by an applicant or recipient of services, the State unit must make all requested information in that individual's record of services accessible to and must release information to the individual or the individual's representative in a timely manner." 34 C.F.R. § 361.38(c).

a) GVRA has failed to conduct an AWT evaluation for over a year, despite listing it as a primary service in the determination of eligibility in November 2022 and including it in the IPE in June 2023;

b) GVRA failed to offer timely specific post-employment services necessary for Ms. W[redacted] to retain her employment with SSA, including but not limited to AWT services and assistance with her efforts to arrange for closed captioning or other communication technologies as required under 29 U.S.C. § 723(a)(20); 34 C.F.R. § 361.5(41);[38]

c) GVRA failed to timely address, by amending the IPE or otherwise, new information regarding Ms. W[redacted]'s deteriorating medical conditions, such as carpal tunnel syndrome and connective tissue disorder causing shoulder problems, and new mental health concerns, such as PTSD, as required by Section 310.1.01 of the VR Manual;[39] and

d) GVRA has failed to timely decide whether Ms. W[redacted]'s IPE should be amended to include payment of reasonable fees or other ancillary or auxiliary services, such as costs associated with necessary certifications, licenses, or training in various claims-related

[38] The federal regulations state that post-employment services are provided subsequent to the achievement of an employment outcome and must be necessary for an individual to maintain their employment and consistent with the individual's unique priorities, capabilities, interests, and concerns. Id. In a note, the regulation states that post-employment services are intended to be limited in scope and duration and are not used to address complex needs. Id. The note gives the following examples of appropriate post-employment services: "e.g., the individual's employment is jeopardized because of conflicts with supervisors or co-workers, and the individual needs mental health services and counseling to maintain employment, or the individual requires assistive technology to maintain employment. …" Id.

[39] Specifically, GVRA has not timely responded to Ms. W[redacted]'s request to add "physical and mental restoration services" to her IPE, or her assertion that such services are necessary for her employment goals and are not readily available from a source other than GVRA, such as health insurance or a comparable service or benefit. See 34 C.F.R. §§ 361.5(c)(39)(x)(physical therapy) & (xiii) (mental health services), 361.48(b)(5). See also VR Manual, Section 136.1.03 (counselor shall issue a notice of change when GVRA denies an individual's request for specific services).

fields, such as worker's compensation or claims adjusting, as set forth in 34 C.F.R. § 361.48(b)(6)(training) & (16)(licenses and tools) and Section 446.1.21 of the VR Manual (GVRA may provide ancillary services, including admission tests, training aids, certifications or licensure examinations.).

19. Ms. W[redacted] has failed to prove, however, that GVRA committed a substantive violation of the Act or the provisions of the VR Manual by failing to place her in remote internships or apprenticeships or to quickly build relationships with employers willing to offer fully remote employment opportunities. See VR Manual, Sections 422.1.01, 424.2.01. The evidence proved that GVRA staff provided some job leads for Ms. W[redacted], did a little investigating of remote internship opportunities, and monitored her job search efforts. Although remote jobs and internships in her chosen field are not plentiful in Georgia, and her unwillingness to consider call center work likely reduced her remote job opportunities, the evidence showed that GVRA made some efforts to assist Ms. W[redacted] in identifying potential employers that met her specific goals, and they provided some job listings for her to consider. Accordingly, Ms. W[redacted] is not entitled to relief on this claim.

E. Remedies

20. Despite acknowledging that it failed to meet procedural requirements or to provide services specified in Ms. W[redacted]'s IPE, GVRA did not cite any legal authority regarding the scope of the remedies available for violations of the Act. Rather, GVRA's position appears to be what it told Ms. W[redacted] during the November 1, 2023 meeting – we don't have to fix any past problems, but we will try to follow the rules and provide the services required going forward. Or perhaps, as Mr. Allen testified, GVRA believes that the consequences for GVRA's failure to abide by the VR

Manual or federal law is limited to a negative audit finding when the federal government periodically reviews GVRA's program.

21. The case law, however, provides that individuals who prove substantive violations of the Act or procedural violations that caused substantive harm may obtain relief similar to that granted under the identically-worded relief provisions in the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*., including equitable reimbursement, compensatory services, and other prospective relief. Millay, 986 F. Supp. 2d at 76; Diamond v. Michigan, 431 F.3d 262, 266-67 (6th Cir. 2005).[40] Using the IDEA cases as guidance, the Court concludes that Ms. W[redacted] is entitled to some, but not all, of the relief she requested, as set forth below.

22. First, the Court concludes that Ms. W[redacted] proved that some of the procedural violations, specifically those relating to the untimely eligibility determination and IPE development, caused her substantive harm. The preponderance of the evidence proved that GVRA's unjustified delay in developing the IPE following its unjustified delay in determining eligibility resulted in a six-month delay in the provision of VR services. Although the Court does not find that Ms. W[redacted] proved that these delays were the sole cause of her eventual termination from SSA (the notice stated only that she could not perform essential duties "with or without" reasonable accommodations), the absence of any post-employment services, such as AWT services or mental health counseling, likely contributed to her difficulties in meeting the demands of her job given

[40] Under IDEA case law, in addition to compensatory relief involving "'discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student,'" reimbursement of "expenses that the state should have paid all along and would have borne in the first instance had it developed a proper IEP" are also available. See Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp 2d 1331, 1352-53 (N.D. Ga. 2007), *aff'd* 518 F.3d 1275 (11th Cir. 2008) (quotations omitted). The amount of reimbursement and prospective relief to be awarded are to be "determined by balancing the equities. Factors that should be considered include "the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters." Burlington v. Dep't of Educ., 736 F.2d 773, 801-801 (1st Cir. 1984), *aff'd* Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985).

her disabilities. Nevertheless, Ms. W[redacted] has not cited any authority, under IDEA or the Act, that provides an entitlement to back pay. That request is therefore denied.

23. With respect to Ms. W[redacted]'s other requests for relief, after weighing all the evidence in the record, the Court concludes that she is entitled to the following as a result of the substantive violations and procedural violations relating to the delayed eligibility determination and IPE:

a) Immediate referral for an AWT evaluation to be conducted remotely or, with Ms. W[redacted]'s permission, in her home, and prompt implementation of any recommendations for AWT services covered under the Act;

b) Reimbursement for reasonable expenses incurred for training, licenses, and related fees in her chosen field upon submission of receipts or other acceptable proof of payment;

c) Prompt amendment of Ms. W[redacted]'s IPE to include payment for physical and mental restoration services, including PT and counseling for anxiety and PTSD, upon receipt of documentation from Ms. W[redacted] that such services have been ordered by a physician or psychologist and that she does not have comparable benefits available through insurance or other sources;

d) Prompt scheduling of a virtual meeting, within ten days of the date of this Final Decision, to consider Ms. W[redacted]'s requests to change the eligibility determination and priority category assignment, update the needs assessment, and amend the IPE to address her diagnoses of anxiety and memory loss, as well as any other impairments due to PTSD, carpal tunnel syndrome, or connective tissue disorder, upon her submission of acceptable documentation.

e) Prompt amendment of the IPE to specify the job placement services that GVRA will provide, including dates and description of outreach services;

f) Prompt access, either electronically or by hard copies, to her entire GVRA file, including all medical records, email communications, or other documents relating to GVRA's provision of services under the Rehabilitation Act. If GVRA asserts that any of the records in Ms. W[redacted]'s file fall within the exceptions to release under the Rehabilitation Act, they shall describe the excluded record, including a general description of its contents, the number of pages, the source of the record, when it was received, and a citation to relevant legal authority supporting the denial of access.

24. Any other claims for relief not specifically granted are hereby **DENIED.**

IV. DECISION

In accordance with the foregoing Findings of Fact and Conclusions of Law, Petitioner's claims with respect to Respondent's provision of VR services are hereby **GRANTED in part, and DENIED in part**, as set forth above.

SO ORDERED, this 28th day of February, 2024.

Kimberly W. Schroer
Administrative Law Judge